NO. 20888

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIE RAY SPAIN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

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I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in a one-count Indictment following a non-jury trial.

The offense occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 1407 and 3231. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF THE CASE

Appellant was charged in a one-count Indictment with failure of a narcotic addict and user (American citizen) to register and surrender a registration certificate upon return and entry into the United States at the port of San Diego (San Ysidro), California, in violation of Title 18, United States Code, Section 1407 [C. T. 2]. 1/

Appellant entered a "not guilty" plea on September 27, 1965 [C. T. 16]. His Motion to Dismiss Indictment and Motion to Strike Portion of Indictment were denied on December 6, 1965 [C. T. 17]. Court trial commenced on December 16, 1965, before United States District Judge James M. Carter, and appellant was found guilty as charged on that date [C. T. 18].

Thereafter, on January 31, 1966, appellant was sentenced to the custody of the Attorney General for two years with eligibility for parole at any time and with a recommendation for hospital treatment for narcotics addiction [C. T. 15]. He thereafter filed a timely notice of appeal [C. T. 19].

III

ERROR SPECIFIED

Appellant's points upon appeal may be summarized as follows:

1. That the statute and regulation in question violate the

1/ "C. T." refers to the Clerk's Transcript.

Fifth Amendment prohibition against self-incrimination.

2. That the statute and regulation in question violate the Fifth Amendment due process clause by unconstitutionally restricting the right to travel.

3. That the statute and regulation in question violate the Fifth Amendment by failing to give notice.

4. That the statute and regulation in question violate the Eighth Amendment prohibition against cruel and unusual punishments.

IV

STATEMENT OF THE FACTS

Appellant entered the United States from Mexico at San Ysidro, California, on August 20, 1965 [R. T. 18]. 2/ At that time he was a citizen of the United States [R. T. 17]. He failed to register under Title 18, United States Code, Section 1407 [R. T. 19].

Appellant was examined by Dr. Paul R. Salerno on the same date [R. T. 4-5]. Dr. Salerno testified concerning his medical background and his expert qualifications in the field of examination of narcotic users and addicts [R. T. 4-5]. He testified that upon the date in question appellant had 34 recent needle marks, was under the influence of narcotics, and was a narcotics addict and user [R. T. 6-8]. He defined a "recent" needle mark as one made from

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2/ "R. T." refers to the Reporter's Transcript of Proceedings, which is part of the record upon this appeal [C. T. Index].

about one to six or seven days prior to the examination [R. T. 8].

The Court entered a finding of fact that appellant was a user of narcotic drugs and a narcotics addict [R. T. 27].

V

ARGUMENT

A. SECTION 1407 OF TITLE 18, UNITED STATES CODE, DOES NOT VIOLATE THE PRIVILEGE AGAINST SELF-INCRIMINATION.

Appellant contends that the registration requirement of Title 18, United States Code, Section 1407, violates the Fifth Amendment privilege against self-incrimination. The courts have held otherwise.

Reyes v. United States, 258 F. 2d 774, 778-82 (9th Cir. 1958);

Palma v. United States, 261 F. 2d 93, 95 (5th Cir. 1958);

United States v. Eramdjian, 155 F. Supp. 914, 925-29 (S. D. Cal. 1957). 3/

3/ It should be noted that appellant makes no attack upon that portion of Section 1407 requiring prior convicted violators to register (Appellant's Opening Brief, p. 4).

It also might be noted that the question of the constitutionality of Section 1407 is before this Court in three other cases pending at the time of the preparation of this brief:

Sharon Jeanne Weissman v. United States, No. 19974;
Jimmie Merl Mason v. United States, No. 20233;
Conrad Allen v. United States District Court, No. 20948.

Appellant places his primary reliance upon the Supreme Court decision in Albertson v. Subversive Act Cont. Bd., 382 U.S. 70 (1965), which involves the application of the self-incrimination privilege to the statutory requirement of registration by Communist Party members in absence of registration by the Party itself.

However, there are three vital distinctions between Section 1407 and the legislation involved in Albertson:

1. Registration in Albertson would have practically amounted to confession of commission of a crime by every registrant, whereas registration under Section 1407 does not amount to confession of commission of any crime.

2. Registration in Albertson involved self-incrimination in connection with potential Federal prosecution, while Section 1407 registration does not have this effect.

3. No tribunal is available under Section 1407 to test a claim of the privilege, so the rule of United States v. Sullivan, 274 U.S. 259 (1927) is applicable.

(1) In Albertson, supra, registration would have involved an admission that the registrant was a member of the Communist Party (at p. 72). This comes very close to a confession of having violated Title 18, United States Code, Section 2385, which provides for fine and imprisonment of any person who knowingly "becomes or is a member of, or affiliates with", any society group, or assembly of persons who advocate the overthrow of any government in the United States.

Section 841 of Title 50, United States Code, provides in part as follows:

> "The Congress finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States. . . . Therefore, the Communist Party should be outlawed." (Emphasis added).

One observer examined the Communist Party registration statutes and noted that "a person who registers his membership in an action organization practically confesses his violation of the Smith Act".

18 University of Chicago Law Review 687, 726 (1951).

A Federal Court of Appeals has stated:

> "The conclusion is inescapable that the Communist Party is sui generis. The legislative array facing the Party virtually makes it a criminal conspiracy per se. Confirmation of this status is contained in a series of Supreme Court cases holding that mere association with the Communist Party presents sufficient threat of criminal prosecution to support a claim of the privilege against self-incrimination."

Communist Party of United States v. United States, 331 F. 2d 807, 812 (C. A. D. C. 1963).

Consequently, it is not surprising that the Supreme Court declined to uphold the Communist Party registration requirement in Albertson, stating that "we have held that mere association with the Communist Party presents sufficient threat of prosecution to support a claim of privilege" (at p. 77).

The Albertson opinion was written by Justice Brennan whose views upon the subject of the applicability of the self-incrimination privilege to the Communist Party are clearly set forth in his dissenting opinion in Communist Party v. Control Board, 367 U.S. 1, at 198-199 (1961):

> "The inquiry implicit in the requirements of completing, signing and filing here is precise; it demands disclosure on matters of officership in, and knowledge of, the Communist Party. The incriminating nature of that inquiry seems plain on its face, since an admission of officership and knowledge would be not merely a possible link in the chain needed to convict under the Smith Act but would establish a main ingredient of the crime proscribed in the membership clause of the Act as this Court construes it today in Scales v. United States." (Emphasis added).

It is clear that Albertson was based upon the obvious aspect of the self-incriminatory nature of the statute in question. This Court reached a similar result in Russell v. United States, 306 F. 2d 402 (9th Cir. 1962), holding that the firearm registration requirement

of 26 U. S. C. A. 5841 was unconstitutional because the registrant would necessarily admit possession, and "proof of possession establishes prima facie, a violation of that section" (at p. 411).

In the instant case appellant asserts that registration under Section 1407 might tend to incriminate him under California Health and Safety Code Section 11721; California Vehicle Code Section 23105; and California Welfare and Institutions Code Section 3100.

Under Section 11721 it is a misdemeanor to "use, or be under the influence of" narcotics, with certain exceptions. Section 23105 provides for penalties for committing the offenses of driving a vehicle while addicted to, or under the influence of, narcotic drugs. However, the questioned portion of Section 1407 does not provide for the admission of commission of any act, criminal or otherwise. It merely provides for a declaration of status, i. e., one who "is addicted to" or "uses" narcotic drugs. It is not a crime to be an addict or user of narcotic drugs in California. It is a crime to "use" narcotics in California, but a Section 1407 registrant admits no use within the state. His registration cannot provide the basis for criminal prosecution for use of narcotics, because venue in California cannot be proved. Proof of venue is essential in a California criminal prosecution.

People v. Megladdery, 40 Cal. App. 2d 748, 762-64 (1940);

People v. Parks, 44 Cal. 105 (1872).

The third statute mentioned by appellant is Section 3100 of the California Welfare and Institutions Code, providing for

commitment of narcotics addicts or potential addicts. Statutes of this type are civil in nature, not criminal.

In Re De La O, 59 Cal. 2d 128 (1963),

cert. denied, 374 U. S. 856 (1963);

1 San Diego Law Review 68-69.

Also see:

Robinson v. California, 370 U. S. 660 (1962).

Consequently, there can be no self-incrimination based upon fear of "prosecution" under Section 3100, a civil statute.

If Section 1407 registration does not fail within the category of obvious self-incrimination, which was condemned in Albertson, supra, and Russell, supra, does it qualify as self-incrimination of the more subtle variation generally described as furnishing a "link in the chain of evidence needed in a prosecution . . ."? 4/ The answer must be in the negative, because Reyes, supra, and Palma, supra, upholding the constitutionality of Section 1407, were decided in 1958, long after the "link-in-the-chain" principle was well-established in American jurisprudence by such decisions as Blau v. United States, 340 U. S. 159 (1950). Appellant provides no reason for adopting in 1966 a "link-in-the-chain" theory held inapplicable by this Court in 1958.

(2) A second vital distinction between Albertson and the instant case is the fact that Albertson involved no question of infringement upon the sovereignty of another jurisdiction. Albertson

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4/ Blau v. United States, 340 U. S. 159, 161 (1950).

involved a Federal statute and a question of possible prosecution for commission of a Federal crime. Appellant's Section 1407 argument involves a Federal statute and alleged self-incrimination in regard to state prosecution. The rule of law proposed by appellant would have the most startling consequences. Various Federal statutes requiring the preparation of forms or other written documents might be nullified by state legislation creating criminal offenses, enabling the individual to refuse to comply with the Federal statutes upon the ground of self-incrimination under state law. Furthermore, state legislation would face the same risks, because Congress might nullify various state statutes by creating criminal offenses. The Supreme Court has held that "the same standards must determine whether an accused's silence in either a federal or state proceeding is justified" 5/ and that "the basic issue is the same whether the testimony is compelled by the Federal Government and used by a State, or compelled by a State and used by the Federal Government". 6/

Assuming arguendo that Section 1407 registration would be self-incriminatory in some cases, the solution to the problem lies not in the destruction of the statute but in providing a cloak of protection at the time that attempts are made to utilize the alleged self-incriminatory statements against the registrant, i.e., at the later state proceeding. This is the nature of the solution adopted

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5/ Malloy v. Hogan, 378 U.S. 1, 11 (1964).

6/ Murphy v. Waterfront Comm'n., 378 U.S. 52, footnote 1 at p. 53 (1964).

by the Supreme Court when faced with the difficult problem of Federal-state friction in the area of the Fifth Amendment in Murphy v. Waterfront Comm'n., 378 U.S. 52 (1964). In Murphy, witnesses refused to testify at a state hearing upon the ground that the answers might tend to incriminate them under Federal law. The Supreme Court held (at p. 79) that the witnesses would be compelled to answer the questions and that the Federal Government must be prohibited from using the "compelled testimony and its fruits" in connection with criminal prosecutions against the witnesses.

Should the same sensible approach be adopted in the instant case, a potential Section 1407 registrant would not be excused from registering, but any admissions made therein could not be used against him in criminal proceedings. No immunity statute is required:

> "Indeed, a witness does not need any statute to protect him from the use of self-incriminating testimony he is compelled to give over his objection. The Fifth Amendment takes care of that without a statute."
> (Emphasis added).
>
> Adams v. Maryland, 347 U.S. 179, 181 (1954)
> cited with approval in Murphy, supra, at 75.

By retaining Section 1407 while prohibiting the use of self-incriminatory statements (if any) in evidence, the severe problem of Federal-state encroachment upon the sovereignty of each respective jurisdiction is removed with no greater risk of self-

incrimination that may be found in the practices authorized by the Supreme Court in Murphy, supra, a case involving several concurring opinions but no dissent. The alternative suggested by appellant would permit state legislatures to nullify registration statutes passed by Congress, and vice versa.

(3) A third significant distinction between Albertson and the instant case is the fact that no tribunal is available under Section 1407 to test a claim of the privilege against self-incrimination. The Albertson opinion cites United States v. Sullivan, supra, 274 U.S. 259 (1927), in which it was held that one claiming that an income tax return called for self-incriminatory answers should raise the objection in the return but could not refuse to make any return at all (at p. 263). In a statement particularly significant in regard to the instant case, in which appellant failed to register, the Supreme Court's unanimous opinion in Sullivan stated:

> "He could not draw a conjurer's circle around the whole matter by his own declaration that to write any word upon the government blank would bring him into danger of the law." (at p. 264).

Albertson distinguished Sullivan upon the basis that "first, that a self-incrimination claim against every question on the tax return, or based on the mere submission of the return, would be virtually frivolous, and second, that to honor the claim of privilege not asserted at the time the return was due would make the taxpayer rather than a tribunal the final arbiter of the merits of the claim" (at p. 79, Emphasis added).

In the instant case, as in Sullivan, there is no tribunal available to rule upon the merits of a self-incrimination claim made at the time of required registration. The registrant may not silently hear his own claim and then rule in his own favor.

Since this is not a case similar in nature to Albertson, supra, and Russell, supra, in which every registrant must practically confess, it is respectfully submitted that the general rule announced in Sullivan, supra, should be applied.

B. SECTION 1407 OF TITLE 18, UNITED STATES CODE, DOES NOT UNCONSTITUTIONALLY RESTRICT THE RIGHT TO TRAVEL.

Appellant contends that Section 1407 of Title 18 places an unconstitutional restriction upon the right to travel. This Court has held that it does not.

> Reyes v. United States, supra, 258 F.2d 774, 778, 782-83 (Footnote).
>
> " 'The right to travel is not an absolute one, free of all restraint or regulation.' "
>
> Reyes, supra, footnote at p. 783, quoting United States v. Eramdjian, supra, at 929.

C. SECTION 1407 OF TITLE 18, UNITED STATES CODE, DOES NOT VIOLATE THE FIFTH AMENDMENT BY FAILURE TO GIVE NOTICE.

Appellant contends that Section 1407 is unconstitutionally vague in regard to the terms "addicted" and "uses". This argument was rejected in Palma v. United States, supra, 261 F. 2d 93 (5th Cir. 1958), where the appellant unsuccessfully argued that Section 1407 and the regulations pursuant thereto "fail to define a proper standard of guilt by being vague and indefinite . . ." (footnote at pp. 94-95). The appellant's brief in Palma reveals that the question of alleged vagueness of the addict and user terms was raised in that appeal. 7/

In regard to the term "addicted", as used in Section 1407, the constitutionality of that term was settled by this Court's decision in Reyes v. United States, supra, 258 F. 2d 774, 778 (9th Cir. 1958), affirming United States v. Eramdjian, supra, 155 F. Supp. 914 (S. D. Cal. 1957). The latter decision held that the "addicted" term was sufficiently definite (at pp. 919, 930-31).

Furthermore, appellant raised no question in the trial court regarding the term "addicted". In fact, his counsel stated that Dr. Salerno's definition of the term was "probably a sound definition" [R. T. 24]. An issue must be raised in a timely fashion in the trial

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7/ It is a proper practice to refer to appellate briefs in order to determine whether a particular question was raised upon appeal, e. g., Murphy v. Waterfront Comm'n., supra, 378 U. S. 52, 65-66; Karrell v. United States, 247 F. 2d 706, 709-10 (9th Cir. 1957)

court.

Ramirez v. United States, 294 F.2d 277, 283 (9th Cir. 1961).

The remaining term in question is "uses". This term compares favorably with other words and phrases which have been upheld by the United States Supreme Court when attacked upon the ground of unconstitutional vagueness:

1. Prohibition of building fires in or "near" inflammable material. 8/

2. "Obscene, lewd, lascivious, filthy, indecent, or disgusting." 9/

3. "Moral turpitude." 10/

4. "Reasonable allowance for salaries" (income tax prosecution). 11/

5. "orthodox Hebrew religious requirements" (criminal case). 12/

6. "any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States" (found to be sufficiently definite for the facts of the case then before the

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8/ United States v. Alford, 274 U.S. 264 (1927).

9/ Winters v. New York, 333 U.S. 507, 518 (1948).

10/ Jordan v. DeGeorge, 341 U.S. 223 (1951).

11/ United States v. Ragen, 314 U.S. 513, 523 (1942).

12/ Hygrade Provision Co. v. Sherman, 266 U.S. 497 (1925).

Court). [13]

7. "to do all in one's power." [14]

8. "unreasonable waste of natural gas." [15]

9. Contribution for any "political" purpose. [16]

10. "offensive" words to another. [17]

11. Acts which "tend to accomplish" certain results. [18]

12. "connected with or related to the national defense." [19]

13. "psychopathic personality." [20]

It is possible, of course, to conjure hypothetical factual situations in which the "uses" term might be subject to a question of definition. This may be true of most criminal statutes. Interpretation of statutes is one of the functions of an appellate court, but it is not a common practice to declare statutes to be void because they may need interpretation under unusual circumstances. As an example, the state burglary statutes may have been considered ambiguous when originally enacted, due to questions regarding

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13/ Williams v. United States, 341 U.S. 97 (1951).

14/ Miller v. Strahl, 239 U.S. 426 (1915).

15/ Bandini Co. v. Superior Court, 284 U.S. 8 (1931).

16/ United States v. Wurzbach, 280 U.S. 396 (1930).

17/ Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

18/ Waters-Pierce Oil Co. v. Texas, 212 U.S. 86 (1909).

19/ Gorin v. United States, 312 U.S. 19 (1941).

20/ Minnesota v. Probate Court, 309 U.S. 270 (1940).

the nature of an "entry" (extending an arm through an open window?), an "inhabited building" (tenants away visiting Europe), and "night-time" (half hour after sunset?). The courts have solved the problem by defining the terms rather than striking down the burglary statutes. The same could be said of dozens of other well-established criminal statutes.

In Scales v. United States, 367 U. S. 203 (1961), the appellant, convicted of being a member of an organization advocating the overthrow of the Government of the United States by force or violence, contended that the term "member", was excessively vague, because it did not distinguish between "active" members and "nominal" members. The Supreme Court rejected this argument and held that clarification of the term could be accomplished by instructions to the jury:

> "Nor do we think that the objection on the score of vagueness is a tenable one. The distinction between 'active' and 'nominal' membership is well understood in common parlance [citing authorities], and the point at which one shades into the other is something that goes not to the sufficiency of the statute, but to the adequacy of the trial court's guidance to the jury by way of instructions in a particular case." (at p. 223, Emphasis added).

The Court added that it made no difference in that particular case, as the appellant was clearly an active member.

In the instant case, as in Scales, any ambiguity in the meaning of the term "uses", would not go "to the sufficiency of the statute. . . ". Appellee does not concede, however, that the term "uses" is vague. Appellant cites no authority upon the question to support his attempt to accomplish the overruling of the decision in Palma, supra.

The Supreme Court has held:

> "We have several times held that difficulty in determining whether certain marginal offenses are within the meaning of the language under attack as vague does not automatically render a statute unconstitutional for indefiniteness. United States v. Wurzbach, 280 U.S. 396, 399 (1930). Impossible standards of specificity are not required. United States v. Petrillo, 332 U.S. 1 (1947)."
>
> Jordan v. DeGeorge, 341 U.S. 223, 231 (1951).

This Court has held:

> "The fact that in some cases it may be difficult to determine the side of the line on which a particular fact situation falls is not sufficient reason to hold the language too ambiguous to define a criminal defense."
>
> Turf Center, Inc. v. United States, 325 F.2d 793, 795 (9th Cir. 1963).

D. ASSUMING ARGUENDO THAT THE "USES" PORTION OF TITLE 18, UNITED STATES CODE, SECTION 1407 IS UNCONSTITUTIONAL, APPELLANT HAS NO STANDING TO OBJECT.

Even if it be conceded, for purposes of argument only, that the "uses" portion of Section 1407 is unconstitutionally vague, appellant has no standing to object. He was convicted of being an addict and a user who failed to register. If the "uses" portion is stricken as void surplusage, appellant still stands convicted of failure to register as an addict. The Court found as a finding of fact that appellant was a narcotic addict as well as a narcotic user [R. T. 27].

There is an additional reason for reaching the conclusion that appellant has no standing to object.

> "A litigant can be heard to question the constitutionality of a statute only when and insofar as he at least claims to be damaged by its operation."
>
> Atherton v. United States, 176 F.2d 835, 841 (9th Cir. 1949), citing Alabama State Federation of Labor v. McAdory, 325 U.S. 450 (1945).

In Williams v. United States, supra, 341 U.S. 97, 101 (1951), and in Scales v. United States, supra, 367 U.S. 203, 223 (1961), the Supreme Court stated that it did not matter that a criminal statute was unconstitutionally vague as to some people, so long as the defendant in question clearly fell within the scope of the

terminology alleged to be vague. For example, in Williams the Court would not decide whether the broad language of the statute, prohibiting a violation of another's constitutional rights, was excessively vague, because the defendant's conduct in beating and pounding prisoners until they confessed obviously deprived the prisoners of their constitutional rights.

In the instant case appellant obviously was a user of narcotics, considering the testimony most favorably to the prevailing party, so it is immaterial that he may claim that the "uses" portion of the statute is vague as to someone else. He had 34 recent needle marks and was addicted and under the influence of narcotics (R. T. 6-8).

Assuming arguendo that the "uses" portion of Section 1407 is vague, it is respectfully submitted that there is no reason not to follow the Supreme Court approach to this type of problem as exemplified by the decisions in Williams, supra, and Scales, supra.

E. TITLE 18, UNITED STATES CODE, SECTION 1407, DOES NOT INVOLVE CRUEL AND UNUSUAL PUNISHMENT.

Appellant argues that the registration requirement of Section 1407 involves cruel and unusual punishment, citing Robinson v. California, supra, 370 U.S. 660 (1962).

Robinson held that subjecting a narcotics addict to criminal punishment merely because he was addicted constituted cruel and unusual punishment. To do so would amount to punishing one for

being ill.

Robinson did not hold that narcotics addicts are free from all controls. On the contrary, the decision recognized that "a State might establish a program of compulsory treatment for those addicted to narcotics. Such a program of treatment might require periods of involuntary confinement. And penal sanctions might be imposed for failure to comply with established compulsory treatment procedures." (at p. 665, emphasis added).

Needless to say, if the inconvenience of going behind bars for compulsory treatment does not constitute cruel and unusual punishment, the Section 1407 requirement of filling a few blanks upon a piece of paper can hardly be described as "cruel" or "punishment".

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of conviction should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Robert L. Brosio

ROBERT L. BROSIO